

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO VASQUEZ,

Defendant and Appellant.

B245026

(Los Angeles County
Super. Ct. No. BA215060)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Kathleen Kennedy, Judge. Appeal dismissed; writ petition denied.

Alejandro Vasquez, in pro. per.; California Appellate Project, under appointment by the Court of Appeal, Jonathan B. Steiner, Executive Director, and Richard B. Lennon for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In 2002 a jury convicted Alejandro Vasquez of second degree murder and found true various firearm-use enhancement allegations, including an allegation that defendant personally fired a gun, causing death (Pen. Code, § 12022.53, subd. (d); undesignated statutory references are to the Penal Code). The trial court sentenced defendant to a term of 40 years to life in prison, consisting of 15 years to life for the murder plus 25 years to life for the section 12022.53, subdivision (d) enhancement. Defendant appealed, alleging that the trial court erred by excluding evidence and that the firearm enhancement could not be imposed because it merged with the murder, its imposition violated section 654, and true findings under subdivisions (c) and (d) of section 12022.53 constituted multiple convictions of necessarily included offenses. This court found no merit in defendant's claims, but modified the judgment to eliminate presentence conduct credits pursuant to section 2933.2. (*People v. Vasquez* (May 28, 2003, B158614) [nonpub. opn.].)

On September 12, 2012, Vasquez filed a "Motion to Vacate the Judgment/Application for the Writ of Error Coram Novis [*sic*]" in the trial court. The motion alleged the following claims: (1) people who should have been disqualified for bias served as jurors in his trial, including law enforcement officers, people related to law enforcement officers, people who had prior jury service, and a former district attorney who knew the prosecutor, defense counsel, and the judge; (2) jurors were prejudiced by "the extra security into the trial court"; (3) imposition of consecutive life terms violated double jeopardy, section 654, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348], and *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531]; (4) the trial court misinstructed the jury using CALJIC Nos. 2.90 and 17.41.1; (5) defense counsel did not advise him of his right to testify and the trial court did not take his waiver of his right to testify until after it had instructed the jury about him not testifying; (6) the prosecutor violated a rule of professional conduct and *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194] by withholding evidence of the absence of flight, failing to introduce some of the evidence found at the scene, and failing "to explore or even question the tactics used by detectives in relationship to hearsay created by themselves"; and (7) trial counsel

rendered ineffective assistance by failing to “move excuse biased jurors,” “object to the trial court’s instructional errors in instructing the jury with CALJIC No. 2.90, and 17.41.1,” and “object to the sentence of 40 years plus two life terms as cruel and unusual punishment and in violation of Apprendi v. New [J]ersey, rule, and Penal Code Section § 654.”

The trial court denied the motion to vacate, noting, “There is no merit to any of the petitioner’s claims. He is misusing the writ procedure and there are no grounds to vacate the judgment.” Vasquez appealed from that order. We appointed counsel to represent Vasquez on appeal. After examination of the record, counsel filed an opening brief raising no issues and asking this court to independently review the record. On February 20, 2013, Vasquez filed his supplemental brief arguing some of the same claims as in his petition and adding a claim of ineffective assistance of appellate counsel for failing to raise on appeal the claims raised herein.

To place this case in the proper procedural posture, we deem Vasquez’s appeal from the trial court’s ruling to be an original petition in this court for a writ of error *coram vobis*. (*People v. Brady* (1973) 30 Cal.App.3d 81, 83 [appeal from trial court’s ruling on petition for writ of error *coram nobis* properly treated as *coram vobis* petition in the appellate court].)

A writ of *coram nobis* or *coram vobis* is a narrow remedy used to secure relief when no other remedy exists. (*People v. Adamson* (1949) 34 Cal.2d 320, 326.) In order to obtain relief the petitioner must establish the existence of some fact that, without his fault or negligence, was not presented to the court at the trial and would have prevented the rendition of the judgment; that the new evidence does not go to the merits of the issues of fact determined at trial; and that he did not know nor could he have, with due diligence, discovered the facts upon which he relies any earlier than the time he filed his petition for the writ. (*People v. Kim* (2009) 45 Cal.4th 1078, 1093 (*Kim*).) “The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and relitigate the propriety of their convictions *ad infinitum*. In the vast majority of cases a trial

followed by a motion for a new trial and an appeal affords adequate protection to those accused of crime. The writ of error *coram nobis* serves a limited and useful purpose. It will be used to correct errors of fact which could not be corrected in any other manner. But it is well-settled law in this and in other states that where other and adequate remedies exist the writ is not available.” (Kim, *supra*, 45 Cal.4th at p. 1094.) In addition, a *coram nobis* or *coram vobis* petition may raise only errors of fact, not errors of law. (*Id.* at p. 1093.) Nor may such a petition be based on a claim of ineffective assistance of counsel. (*Id.* at p. 1104.) A petition for writ of *coram nobis* or *coram vobis* may not attempt to ““correct an issue of fact which has been adjudicated, even though wrongly determined; nor for alleged false testimony at the trial; nor on the ground that a juror swore falsely as to his qualifications; nor for newly discovered evidence.”” (In re Lindley (1947) 29 Cal.2d 709, 726.)

The claims Vasquez asserts are legal in nature, not factual, and they either were or could have been raised in his appeal. Alternatively, they could have been raised in a timely petition for a writ of habeas corpus following the filing of the appellate opinion in B158614. Indeed, Vasquez filed a habeas corpus petition in this court in 2006, raising all of the claims raised herein, including ineffective assistance of appellate counsel. We denied that petition. (*People v. Vasquez* (Feb. 8, 2006, B188208) [nonpub. order].) Because Vasquez had other remedies and his claims are not based upon a newly discovered fact, his claims are not a proper basis for a petition for writ of error *coram nobis* or *coram vobis*.

In addition, to demonstrate diligence, a petition for a writ of error *coram nobis* or *coram vobis* must allege the time and circumstances under which the petitioner discovered the new facts. (Kim, *supra*, 45 Cal.4th at pp. 1096–1097.) In his supplemental appellate brief Vasquez asserts that he was diligent because inmates he engaged to help him “did nothing but raise successive petitions with unmeritorious claims due to their lack of knowledge of law.” This does not satisfy the requirement of showing when and how Vasquez discovered some new fact forming the basis for his motion or

petition, probably because there are no new facts underlying Vasquez’s motion or petition. All of the facts upon which Vasquez’s various claims rely were necessarily known to Vasquez at the time of judgment in 2002.

We decline to construe Vasquez’s motion to vacate or his supplemental appellate brief as a petition for writ of habeas corpus. “[I]n the absence of strong justification, any issue that was *actually* raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus.” (*In re Harris* (1993) 5 Cal.4th 813, 829.) Similarly, “absent strong justification, issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance.” (*Ibid.*) We further note that all of Vasquez’s claims except ineffective assistance of appellate counsel either were or could have been raised in his appeal, Vasquez previously raised his claim of ineffective assistance of appellate counsel in a petition for a writ of habeas corpus, and we rejected that claim.

We have examined the entire record and are satisfied that Vasquez’s counsel has fully complied with his responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

DISPOSITION

The appeal is dismissed; the writ petition is denied.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.